

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application: John Colgrave

Application No.: 10/561,260

Filed: October 16, 2006

Title: "User Access to a Registry of Business Entity Definitions"

Examiner: Joshua A. Murdough

Group Art Unit: 3621

Confirmation No.: 5696

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF REPLY BRIEF

Sir:

Transmitted herewith is the Reply Brief with respect to the Examiner's Answer mailed on May 25, 2011.

This Reply Brief is being filed pursuant to 37 CFR 1.193(b) within two months of the date of the Examiner's Answer.

(Note: Extensions of time are not allowed under 37 CFR 1.136(a))

(Note: Failure to file a Reply Brief will result in dismissal of the Appeal as to the claims made subject to an expressly stated new ground rejection.)

No fee is required for filing of this Reply Brief.

Respectfully submitted,

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REPLY BRIEF

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Sir:

This is a Reply Brief under Rule 41.41 (37 C.F.R) in response to the Examiner's Answer of May 25, 2011 (the "Examiner's Answer" or the "Answer"). In Section 10, the Answer contains a response to some of the arguments made in Appellant's brief. Appellant now responds to the Examiner's Answer as follows.

Status of Claims

Claims 1-16 have been previously cancelled without prejudice or disclaimer.

Claims 17-30 are pending in the application and stand finally rejected.

Accordingly, Appellant appeals from the final rejection of claims 17-30.

Grounds of Rejection to be Reviewed on Appeal

The grounds of rejection to be reviewed on appeal are unchanged by the Examiner's Answer.

- (1) Claims 21-26 stand rejected under 35 U.S.C. § 112, first paragraph, as allegedly failing to comply with the written description requirement.
- (2) Claims 21-26 stand rejected under 35 U.S.C. § 112, first paragraph, allegedly failing to comply with the enablement requirement.
- (3) Claims 17-30 stand rejected under 35 U.S.C. § 112, second paragraph, as being allegedly indefinite.
- (4) Claims 17, 21, and 27 stand rejected under 35 U.S.C. § 102(b) as being allegedly anticipated by U.S. Patent No. 5,414,852 to Kramer et al. ("Kramer").
- (5) Claims 19-20, 23-24, and 29-30 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of U.S. Patent No. 5,629,980 to Stefik et al. ("Stefik").
- (6) Claims 18, 22, 25-26, and 28 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of U.S. Patent Application Publication No. 2002/0046157 by Solomon ("Solomon").
- (7) Claims 17, 21, and 27 stand alternately rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of Stefik.

Accordingly, Appellant has requested review of each of these grounds of rejection in the present appeal.

VII. Argument

Preliminary Note Regarding Appellant's Evidentiary Declaration

In response to the Examiner's repeated request in the most recent Final Office Action for evidence supporting Appellant's position with regard to the outstanding rejections made under 35 U.S.C. § 112, Appellant filed a declaration pursuant to 37 C.F.R. § 1.132 on October 5, 2010. (*See* Final Office Action of Aug. 4, 2010, pp. 5-9). The Declaration includes four evidentiary exhibits in support of Appellant's position that various terms recited in claims 17-30 are definite and well-known in the art. (*See* Appellant's Declaration of Oct. 5, 2010). Notice of the present appeal was then filed on October 6, 2010, and the instant Appeal Brief was filed on December 2, 2010. The Appeal Brief refers to the exhibits of the Declaration as evidentiary support for Appellant's position that the Examiner has improperly rejected claims 17-30 under 35 U.S.C. § 112, second paragraph.

More than six months after the Declaration was filed, and nearly five months after the present Appeal Brief was filed, the Examiner issued an Advisory Action under 37 C.F.R. § 41.33(d)(1) stating the Examiner's refusal to enter the Declaration with its accompanying Exhibits. This Advisory Action is improper for a number of reasons, not least of which being that 37 C.F.R. § 41.33(d)(1) is applicable only to Declarations filed "*after the date of filing an appeal.*" 37 C.F.R. § 41.33(d)(1) (emphasis added).

The Examiner has made it quite clear that he does not wish to consider the evidence presented by the Appellant in response to the Examiner's repeated request. (*See* Non-Final Office Action of Feb. 19, 2010, pp. 13-16; Final Office Action of Aug. 4, 2010, pp. 5-9 and 18-19; Advisory Action of Apr. 27, 2011, pp. 1-2). However, the Examiner has been unable

to demonstrate a good reason not to consider the evidence, which provides valuable insight into the propriety of the outstanding rejection of claims 17-30.

Under these circumstances, a petition was filed on May 12, 2011 to compel the Examiner to enter Appellant's Declaration into the official record of this application. The Office of Petitions has not yet issued a decision on the Appellant's petition of May 12. However, given the clear impropriety of the Examiner's Advisory Action, Appellant remains confident that the petition will be granted and the evidentiary references in Appellant's Declaration will be a part of the record at the time the present appeal is reviewed by the Board. Consequently, the instant Reply Brief continues to refer to the evidentiary references of the Declaration in responding to the arguments of the Examiner's Answer.

(1) Claims 21-26 comply with the written description requirement of 35 U.S.C. § 112, first paragraph.

Claims 21-26 remain rejected under 35 U.S.C. § 112, first paragraph for allegedly failing to comply with the written description requirement. This rejection is improper and should be reversed.

A. “At least one Processor”

The Answer maintains the position that claim 21 fails to meet the written description requirement of 35 U.S.C. § 112, first paragraph because it recites a registry comprising “at least one processor,” where the specification only teaches a single-processor embodiment. (Answer, pp. 18-19). In the Examiner’s view, the phrase “at least one” is alternative language, and each of the claimed alternatives must be expressly disclosed in the specification to comply with the written description requirement. (*Id.*). Appellant respectfully submits that this position is inconsistent with governing law and USPTO policy.

No statute, rule, or governing judicial opinion known to Appellant requires a written description of every single possible construction of a claim term to satisfy the written description requirement.

In fact, the controlling case law contradicts the position taken by the Examiner in this regard. In *Vas-Cath Inc. v. Mahurkar*, 955 F.2d 1555 (Fed. Cir. 1991), the Federal Circuit held that the written description requirement was fulfilled for claim to a catheter disclosing an entire range of dimensions where a single embodiment of a catheter having dimensions within the claimed range was shown in a figure. Clearly, if a figure of a single embodiment falling within the scope of embodiments given in the *Vas-Cath* claim satisfies the written description requirement, a description of a single-processor embodiment in Appellant's specification satisfies the written description requirement for "at least one processor." The bottom line is that Appellant's specification plainly describes in writing an embodiment of a registry having "at least one processor," and thereby provides a written description in compliance with 35 U.S.C. § 112, first paragraph.

B. Registry comprising Processor

The Answer further maintains that the language of "the registry comprising; at least one processor" is new matter because, in the Examiner's view, "even if . . . the functions of the UDDI registry must inherently be performed by a machine executing software, it does not necessarily follow that the UDDI registry comprises 'at least one processor' as recited in claim 21." (Answer, p. 21). Again, the Examiner is applying a false standard in rejecting claim 21.

The written description requirement does not necessitate that the written description of a claimed element be necessarily present in every possible interpretation of words relied upon for the written description in the specification. Rather, a claim limitation may be

“expressly, *implicitly*, or inherently supported in the originally filed disclosure” to comply with the written description requirement. M.P.E.P. § 2163(II)(A)(3)(b) (emphasis added). By requiring the claim limitations to be only expressly or inherently disclosed, and ignoring the permissibility of what is *implicitly* disclosed, the Answer imposes a false dichotomy that oversteps the Examiner’s authority.

Under controlling authority, the written description requirement is a relatively low hurdle to overcome, as it “does not demand either examples or an actual reduction to practice.” *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1352 (Fed. Cir. 2010) (*en banc*). Rather, compliance with the written description requirement is measured by whether, from the perspective of a skilled artisan, “the specification [describes] an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed.” *Ariad Pharmaceuticals*, 598 F.3d at 1351; *see also* M.P.E.P. § 2163.

Using this correct test, the phrase “the registry comprising at least one processor” cannot be new matter, as one having ordinary skill in the art would easily understand from the description in the specification that the inventors were in possession of a registry having at least one processor. (*See* Appellant’s Specification, p. 10 line 32 to p. 11 line 13). Anyone having ordinary skill in the art will readily recognize that a processor is an implied component to any code that is being executed to exhibit a desired functionality.

C. Registry comprising Computer Readable Memory

The Answer makes similar mistakes with regard to its assertion that the claimed “registry comprising . . . a computer readable memory” of claim 21 is new matter. (Answer, p. 22). Again, the Answer attempts to impose the false dichotomy of requiring only express or exclusively inherent disclosure in the specification for compliance with the written description requirement. (*Id.*). In the Examiner’s view, if every conceivable embodiment of

the language described in the specification is not expressly directed to a registry comprising a computer readable memory, then the registry of claim 21 is not disclosed in the specification. (Answer, pp. 23-24). Appellant respectfully submits that the Examiner's position in this regard has no defensible basis in logic or law.

By contrast, the M.P.E.P. states that written description is satisfied when the claim limitation is "expressly, *implicitly*, or inherently supported in the originally filed disclosure." M.P.E.P. § 2163(II)(A)(3)(b) (emphasis added). Nothing in the M.P.E.P. or the relevant case law requires that all possible interpretations of the written description be drawn to the embodiment described in the claims.

Again, Appellant's specification describes the UDDI registry as an active component that performs certain functionality. (*See, e.g.*, Appellant's specification, p. 10 line 32 to p. 11 line 13). This functionality cannot be performed by merely software alone, as software is merely a set of instructions. Rather, the functions of the UDDI registry must inherently be performed by a machine executing software from a computer-readable memory. Thus, the UDDI registry described in Appellant's specification inherently has a machine component. Taken in context with this fact, the specification's statement that "a UDDI registry may be installed on any such client/server" plainly teaches that the described client/server provides the essential hardware components to implement UDDI registry functionality. (Appellant's specification, p. 5 lines 23-24). Among the hardware described in the client/server of Appellant's specification are "a RAM volatile memory element" and a "non-volatile memory." (Appellant's specification, p. 5 lines 27-29, Fig. 1; *see also* p. 12 lines 24-33). As such, the specification plainly teaches a UDDI registry that "comprises" a computer readable memory.

As demonstrated, Appellant's specification expressly teaches a registry comprising computer readable memory. However, even if this teaching were not express in the specification, it is certainly inherent and implied. *See* M.P.E.P. § 2163(II)(A)(3)(b).

D. Conclusion

For at least the reasons given above and in the Appeal Brief, the Examiner has failed to establish that any part of claim 21 fails to comply with the written description requirement of 35 U.S.C. § 112, first paragraph. Consequently, the Final Office Action and Examiner's Answer fail to meet the requisite burden of establishing the *prima facie* unpatentability of claim 21. Therefore, the rejection of claim 21 and its dependent claims based on the written description requirement of 35 U.S.C. § 112, first paragraph, should be reversed.

(2) Claims 21-26 comply with the enablement requirement of 35 U.S.C. § 112, first paragraph.

Claims 21-26 remain rejected as allegedly failing to comply with the enablement requirement of 35 U.S.C. § 112, first paragraph.

The Action continues to assert the perplexing position that a processor configured to perform functions is not enabled by a specification which does not disclose all possible configurations for performing those functions. (Answer, p. 24). Appellant respectfully disagrees. This has never been a requirement for establishing enablement. Anyone having experience with computer hardware and software will understand that an infinite number of computer configurations for performing the functionality recited in claim 21 is possible, and the enablement requirement cannot possibly require that each be individually disclosed in the specification.

The Examiner is overcomplicating the enablement inquiry. It is well settled that a claim directed to machine-implemented functionality is enabled by a sufficient description of the specified functionality of the machine such that one having ordinary skill in the art would be able to cause a machine to implement that functionality. *See, e.g., N. Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 941 (Fed. Cir. 1990) (computer-implemented software is enabled when “a programmer of reasonable skill could write a satisfactory program” implementing the functionality).

The Answer further asserts that Appellant’s Specification “only supports a processor with a hardware configuration,” and not “configurations encompassing both hardware and software.” (Answer, pp. 24-25). This assertion is simply false. The specification plainly discloses a “processor 101 *for executing programs* that control the operation of the client/server.” (Applicant’s Specification, p. 5 lines 27-28) (emphasis added). Anyone having ordinary skill in the art will recognize that language as describing a processor configured to execute software to perform a desired functionality, precisely as recited in claim 21.

For at least the reasons given above and in the Appeal Brief, the Examiner has failed to establish that any part of claim 21 fails to comply with the enablement requirement of 35 U.S.C. § 112, first paragraph. Consequently, the Final Office Action and Examiner Answer fail to meet the requisite burden of establishing the *prima facie* unpatentability of claim 21. Therefore, the rejection of claim 21 and its dependent claims based on the enablement requirement of 35 U.S.C. § 112, first paragraph should be reversed.

(3) Claims 17-30 comply with 35 U.S.C. § 112, second paragraph.

Claims 17-30 remain rejected under 35 U.S.C. § 112, second paragraph, as being allegedly indefinite. This rejection is improper and should be reversed.

A. “Permission Details Associated Therewith”

Claims 17, 21, and 27 recite different forms of “receiving a request in a processor associated with said registry from a user to access a business entity definition comprising a plurality of information elements, each of said information elements having permission details associated therewith.” (Claim 17). According to the Answer, the independent claims are not clear as to whether the object of “therewith” refers to the processor, registry, user, or definition. (Answer, p. 26).

Appellant respectfully disagrees. Under the normal and well-known rules of English grammar, no one having ordinary skill in the art would construe the phrase “each of said information elements having permission details associated therewith” as meaning anything other than that each information element has permission details associated with that information element. Appellant respectfully submits that the meaning of the term “therewith” will be readily apparent to the Board. The Examiner’s assertion that this phrase is unclear borders on frivolity.

B. “Plurality of Information Elements”

The Answer further maintains with respect to claims 17, 21, and 27 that it is unclear whether “the request or the business entity definition” comprises the recited “plurality of information elements.” (Action, p. 28). Appellant again strongly disagrees.

The specification describes business entity definitions which include a plurality of information elements, but does not describe a request that includes a plurality of information elements. (*See, e.g.*, Appellant’s specification, p. 3 line 14 to p. 4 line 24, p. 8 lines 6-10, p. 9

line 34 to p. 10 line 11, p. 10 line 41 to p. 11 line 2, p. 11 line 40 to p. 12 line 4, p. 12 lines 13-18, p. 12 line 40 to p. 13 line 7, Figs. 2-4). Thus, the disclosure of the application unquestionably supports the interpretation that the “business entity definition” is the element that comprises the “plurality of information elements.” (Claim 17).

Contrary to the Examiner’s arguments, the application of the definition of “business entity definition” as used in the specification to the construction of the independent claims is not the same as importing limitations from the specification. The “broadest reasonable interpretation” of a claim term must be made “in light of the specification.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (emphasis added); *In re Am. Academy of Science Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004); *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000); *In re Cortright*, 165 F.3d 1353, 1358 (Fed. Cir. 1999). Thus, a construction of a claim made by an Examiner during examination is unreasonably broad if it is not consistent with the specification or how those skilled in the art would interpret the claim based on their reading of the specification. See, e.g., *Cortright*, 165 F.3d at 1359.

The construction of Appellant’s independent claims proposed by the Answer in the instant rejection is unreasonably broad because it is inconsistent with 1) the specification and 2) the interpretation that those skilled in the art would reach. See *Am. Academy of Science Tech Ctr.*, 367 F.3d at 1364.

The Examiner goes to great length disputing that a reading of claim 17 under the conventions of the English language would result in the clear interpretation that the “business entity definition” is what comprises the “plurality of information elements.” (Answer, pp. 29-30). Again, the Examiner is overcomplicating the issue. Appellant fully trusts that the members of this Board, all of whom are familiar with the conventions of the English

language, will readily understand what element of the independent claims comprises the plurality of information elements.

C. “Business Entity Definition”

Claims 17-30 also remain rejected as being indefinite under 35 U.S.C. § 112, second paragraph, because (A) Examiner has not found a lexicographic definition for the phrase “business entity definition” and (B) it is the Examiner’s position that this phrase is “not known to those of ordinary skill in the art.” (Action, p. 6). This rejection is utterly improper and inappropriate, as the Examiner has not set forth adequate grounds of rejecting these claims.

With respect to the Examiner’s failure to find a lexicographic definition of the term “business entity definition” in the specification, the M.P.E.P. is quite clear that “a claim term that is not used **or defined** in the specification is not indefinite if the meaning of the claim term is discernible.” M.P.E.P. § 2173.02 (citing to *Bancorp Svcs., L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1372, 69 USPQ2d 1996, 1999-2000 (Fed. Cir. 2004)). The Examiner’s requirement that each claim term be either specifically defined in the specification or well-known in the art creates a false dichotomy which precludes the notion that a claim’s term can be discernible from how it is used in the specification in spite of the lack of a formal definition. *See id.*

In an attempt to further support his position, the Examiner cites to M.P.E.P. § 2173.02, which states that if the meaning of a claim term not used or defined in the specification is discernible from the claim itself, then the term is not indefinite. (Answer, p. 32). According to the Examiner, this passage from the M.P.E.P. “does not support Appellant’s conclusion that ‘a claim’s term can be discernible from how it is used in the

specification in spite of the lack of a formal definition.”” (*Id.*). Appellant respectfully disagrees.

The Examiner has not explained his interpretation of the M.P.E.P. in this regard, but it is evident that he is cherry picking the portions of this section of the M.P.E.P. by which he wishes to be bound. The M.P.E.P. plainly states that compliance with the definiteness requirement must be evaluated in light of “(A) the content of the particular application disclosure; (B) the teachings of the prior art; and (C) the claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made.” M.P.E.P. § 2173.02 (emphasis added). Nowhere does it state that the Examiner’s consideration of “the content of the application disclosure” is limited to the question of whether a formal definition exists for the claim term in question.

Furthermore, one having ordinary skill in the art would not need a formal definition of the term “business entity definition” to know, from the context of the application disclosure, that the term refers to the definition of a business entity conforming to or substantially similar to the known UDDI specification. (*See Appeal Brief*, pp. 21-23; Appellant’s specification, title, p. 2 lines 1-4, p. 3 lines 5-9, p. 4 lines 18-24, p. 5 line 42 to p. 6 line 3, p. 6 lines 28-30, p. 6 line 35 to p. 7 line 15; Appellant’s Declaration of Oct. 5, 2010, Ex. A p. 6, Ex. B pp. 3-6).

The Answer cites at length to case law supporting the notion that a claim term not expressly defined should be given its broadest reasonable interpretation, but none of these authorities supports the Examiner’s insistence that a claim term is indefinite if is not expressly defined or well-known outside of the specification. (Answer, pp. 33-34). Again, where the meaning of a claim term can be ascertained by one having ordinary skill in the art

“in light of the specification,” that claim term is not indefinite, despite the lack of a formal definition.

The remainder of the Examiner’s arguments regarding the definiteness of the term “business entity definition” and other terms in claims 17-30 simply rehash the Examiner’s tired arguments, which have been adequately addressed in the Appeal Brief. Appellant expressly does not concede to or agree with any of the positions taken by the Examiner in either the final Office Action or the Answer.

D. Conclusion

For at least these additional reasons, Appellant respectfully submits that the Examiner has still failed to meet his burden to establish that any of the terms recited in claims 17-30 are indefinite under 35 U.S.C. § 112, second paragraph. Consequently, the rejection of claims 17-30 made on these grounds should be reversed.

(4) Claims 17, 21, and 27 are patentable over Kramer.

Claims 17, 21, and 27 remain rejected under 35 U.S.C. § 102(b) as being allegedly anticipated by Kramer. The Examiner’s entire case against claims 17, 21, and 27 under Kramer hinges on his contention that the term “business entity definition” is indefinite and so abstract that one having ordinary skill in the art would have no idea what the term means in light of the specification. (*See, e.g.*, Answer, pp. 36-39). Hence, in the Examiner’s view, this term must be interpreted as simply referring to any type of data structure. Appellant’s reasons for rejecting this position are well documented both above and in the Appeal Brief, and need not be repeated here. (*See supra* Section (3); Appeal Brief, pp. 17-33).

Nevertheless, as pointed out in the Appeal Brief, even under the Examiner’s unreasonably broad interpretation, Kramer would still fail to teach or suggest all of the

subject matter found in claims 17, 21, and 27. (Appeal Brief, pp. 35-37). Because the Examiner's Answer does not address this issue, Appellant is content to allow the Appeal Brief to speak for itself.

Again, “[a] claim is anticipated [under 35 U.S.C. § 102] only if *each and every element* as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal*, 814 F.2d at 631, 2 U.S.P.Q.2d at 1053; *see Verisign*, 545 F.3d at 1371, 88 U.S.P.Q.2d at 1759; M.P.E.P. § 2131. Because the Office has not met its burden to demonstrate the *prima facie* unpatentability of claim 17, the rejection of claim 17 and its dependent claims based on Kramer should be reversed.

(5) Claims 19-20, 23-24, and 29-30 are patentable over Kramer in view of Stefik.

Claims 19-20, 23-24, and 29-30 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of Stefik. This rejection is improper and should be reversed at least for the same reasons given above and in the Appeal Brief in favor of the patentability of independent claims 17, 21, and 27. *See In re Fine*, 837 F.2d 1071, 1076, 5 USPQ2d 1596 (Fed. Cir. 1988) (if an independent claim is nonobvious, then any claim depending therefrom is nonobvious); M.P.E.P. § 2143.03.

(6) Claims 18, 22, 25-26, and 28 are patentable over Kramer in view of Solomon.

Claims 18, 22, 25-26, and 28 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of Solomon. This rejection is improper and should be reversed at least for the same reasons given above and in the Appeal Brief in favor of the patentability of independent claims 17, 21, and 27. *See Fine*, 837 F.2d at 1076 (if an

independent claim is nonobvious, then any claim depending therefrom is nonobvious); M.P.E.P. § 2143.03.

(6) Claims 18, 22, 25-26, and 28 are patentable over Kramer in view of Solomon.

Claims 18, 22, 25-26, and 28 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of Solomon. This rejection is improper and should be reversed at least for the same reasons given above and in the Appeal Brief in favor of the patentability of independent claims 17, 21, and 27. *See Fine*, 837 F.2d at 1076 (if an independent claim is nonobvious, then any claim depending therefrom is nonobvious); M.P.E.P. § 2143.03.

(7) Claims 17, 21, and 27 are patentable over Kramer in view of Stefik.

Claims 17, 21, and 27 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Kramer in view of Stefik. The Answer adds no further arguments or clarification to its position with respect to this rejection. However, this rejection is improper and should be reversed for at least the reasons given previously in the Appeal Brief.

In view of the foregoing, it is again submitted that the final rejection of the pending claims is improper and should not be sustained. Therefore, a reversal of the Rejection of August 4, 2010 is respectfully requested.

Respectfully submitted,

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